FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

August 2, 2002

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE GERALD DON CLARK and MELINDA R. CLARK, Debtors.	BAP No. WO-01-026
VERNON L. DANIELS, Plaintiff – Appellant, v. GERALD DON CLARK, Defendant – Appellee.	Bankr. No. 00-13887 Adv. No. 00-1234 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court for the Western District of Oklahoma

Before CLARK, CORDOVA, and BROWN[1], Bankruptcy Judges.

BROWN, Bankruptcy Judge.

Appellant Vernon Daniels ("Daniels") appeals an order of the United States Bankruptcy Court for the Western District of Oklahoma denying Daniels's motion for summary judgment and granting a cross-motion for summary judgment in favor of the Debtor, Gerald Clark (the "Debtor"). For the reasons set forth below, the order of the Bankruptcy Court is affirmed.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] Honorable Elizabeth E. Brown, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Colorado, sitting by designation.

APPELLATE JURISDICTION

The Bankruptcy Court's Order granting summary judgment in favor of the Debtor is a final, appealable order for purposes of this Court's jurisdiction. 28 U.S.C. § 158(a); *Gregory v. Zubrod (In re Gregory)*, 245 B.R. 171,172 (10th Cir. BAP), *aff'd without published opinion*, 246 F.3d 681 (10th Cir. 2000). Daniels filed a timely notice of appeal under Fed. R. Bankr. P. 8002. With the consent of the parties, this Court has jurisdiction to hear appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1). Neither party has opted to have this appeal heard by the United States District Court for the Western District of Oklahoma, and, therefore, they are deemed to have consented to the jurisdiction of this Court. 28 U.S.C. § 158(c); Fed. R. Bankr. P. 8001(e).

BACKGROUND

Daniels is the former pastor of the Parkview Baptist Church ("Parkview") in Norman, Oklahoma. The Debtor is a former member of Parkview's congregation. In February 1997, the Debtor participated in a church meeting at which he and other members of Parkview's congregation voted to terminate Daniels's employment. Daniels subsequently brought a state court action against the Debtor and other members alleging, in part, that they conspired to remove him as pastor by improper means and that, in doing so, they intentionally interfered with his contractual rights. (Complaint ¶ 26, *in* App. to Appellant's Opening Br. at 0023.) Before the state court had rendered a decision, the Debtor filed his Chapter 7 petition. Daniels then filed an adversary proceeding, asserting that his claim against the Debtor was excepted from discharge on two grounds.

Daniels first argued that his claim was nondischargeable under Section 523(a)(2) because the Debtor made false representations to Daniels and his wife, which induced

Daniels to loan money to the Debtor.[2] Specifically, Daniels alleges the Debtor procured the loans by "falsely professing to Daniels personal friendship, loyalty, support in the form of personal obligation for his and his wife's retirement and care, regard for his pastoral performance and made knowingly false representations of their financial performance and substance upon all of which Daniels unknowingly relied to his substantial detriment." (Complaint ¶ 2.8, *in* App. to Appellant's Opening Br. at 0042.) Second, Daniels argued that the Debtor intentionally interfered with Daniels's contractual relations with Parkview when the Debtor conspired with other members of Parkview's congregation to have Daniels wrongfully terminated. Daniels claimed that the damages caused by the Debtor's intentional interference, including $600,000 in back wages, were nondischargeable under Section 523(a)(6). (Complaint ¶¶ 4.1-4.2, *in* App. to Appellant's Opening Br. at 0043-44.)

The Bankruptcy Court granted the Debtor's motion for summary judgment on both claims. As to the Section 523(a)(2) claim, the Court found that the alleged misrepresentations upon which Daniels supposedly relied – the Debtor's promises of friendship and support – were insufficient to support a claim under Section 523(a)(2) because the statements related to *future* events rather than past or current actions. The Court also denied Daniels's claim under Section 523(a)(6) because Daniels failed to allege facts that, if true, would show that the Debtor had caused Daniels's alleged injury.

On appeal, Daniels argues the Bankruptcy Court's grant of summary judgment in favor of the Debtor was inappropriate because (1) he presented sufficient evidence demonstrating that the Debtor made a present misrepresentation actionable under Section 523(a)(2); and (2) he presented enough evidence to create a jury question as to whether the Debtor intentionally caused damage to Daniels under Section 523(a)(6).

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[2] Unless otherwise specified, all references to "Sections" are to Title 11, United States Code.

DISCUSSION

1. Standard of Review

This Court reviews the grant or denial of summary judgment *de novo*, applying the same standard used by the Bankruptcy Court under Federal Rule of Civil Procedure 56, as made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7056. *See, e.g., United States v. Sackett*, 114 F.3d 1050, 1051 (10th Cir. 1997) (per curiam); *Hutchinson v. Pfeil*, 105 F.3d 562, 564 (10th Cir. 1997). Federal Rule of Civil Procedure 56(c) provides, in relevant part, that: "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. In applying this standard, this Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Schwartz v. Bhd. of Maint. of Way Employees*, 264 F.3d 1181, 1183 (10th Cir 2001).

In the case of the Debtor's motion for summary judgment, the Debtor, as movant, bears the initial burden of establishing that summary judgment is appropriate. *Whitesel v. Sengenberger*, 222 F.3d 861, 867 (10th Cir. 2000); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Because the Debtor would not bear the burden of persuasion in the adversary proceeding, he need not negate Daniels's claims, but need only point out a lack of evidence supporting an essential element of Daniels's claims. *Sigmon v. Communitycare HMO, Inc.*, 234 F.3d 1121, 1125 (10th Cir. 2000). If the Debtor carries this initial burden, Daniels, as nonmovant, must then come forward with specific facts showing that there is a genuine issue for trial. *Spaulding v. United Transp. Union*, 279 F.3d 901, 904 (10th Cir. 2002) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). To

accomplish this, Daniels must identify facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998).

"'[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *Schwartz*, 264 F.3d at 1183 (quoting *Anderson*, 477 U.S. at 248). Disputes as to immaterial facts will not preclude summary judgment. *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1361 (10th Cir. 1993). Should Daniels make some showing on a material issue, this Court must consider the standard of proof in the case and decide whether the showing is sufficient for a reasonable trier of fact to find for Daniels on that issue. *Lawmaster v. Ward*, 125 F.3d 1341, 1347 (10th Cir. 1997); *Anderson*, 477 U.S. at 254. A scintilla of evidence in favor of Daniels is not enough to preclude summary judgment. *Lawmaster*, 125 F.3d at 1347; *Anderson*, 477 U.S. at 252. "'Moreover, should [Daniels] not make a sufficient showing on any essential element of his case, all other facts are rendered immaterial, and summary judgment is appropriate.'" *Doheny v. Wexpro Co.*, 974 F.2d 130, 133 (10th Cir. 1992) (quoting *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d 563, 565 (10th Cir. 1989)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Applying this standard, the Court concludes that Daniels failed to demonstrate a genuine issue of material fact regarding either claim.

2. Section 523(a)(2)

Daniels alleges he was fraudulently induced to make loans to the Debtor based on the Debtor's false promises of "friendship, loyalty [and] support." (Complaint ¶ 2.8, *in* App. to Appellant's Opening Br. at 0042.) The Bankruptcy Court determined that these allegations failed to support a Section 523(a)(2)(A) claim because the representations alleged by Daniels related to *future* events (*i.e.* future friendship and support) and Section 523(a)(2)(A) applies only to representations of *current* or *past* events. On

appeal, Daniels argues a reasonable jury could find, based on the evidence presented, that the Debtor deliberately lied and thus made a "present lie" actionable under Section 523(a)(2)(A). (Appellant's Opening Br. at 9.)

Section 523(a)(2)(A) provides that a discharge under 11 U.S.C. § 727 does not discharge an individual debtor from a debt–

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by–
>
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition[.]

11 U.S.C. § 523(a)(2)(A). To establish that a claim is subject to this exception from discharge, Daniels must prove the following elements: (1) the debtor made a false representation; (2) with the intent to deceive the creditor; (3) the creditor relied on the false representation; (4) the creditor's reliance was justifiable; and (5) the false representation resulted in damages to the creditor. *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996); *Grogan v. Garner*, 498 U.S. 279, 287 (1991).

In *Field v. Mans*, 516 U.S. 59, 70 (1995), the Supreme Court made clear that the term "false representation" in Section 523(a)(2) is defined under the Restatement (Second) of Torts as it existed in 1978 when this phrase was incorporated into the Bankruptcy Code. *Accord Chevy Chase Bank FSB v. Kukuk (In re Kukuk)*, 225 B.R. 778, 782 (10th Cir. BAP 1998). The Restatement provides that "[a] representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention." Restatement (Second) of Torts § 530(1).

Comment b to Section 530(1) of the Restatement states:

> To be actionable the statement of the maker's own intention must be fraudulent, which is to say that he must in fact not have the intention stated. If he does not have it, he must of course be taken to know that he does not have it. If the statement is honestly made and the intention in fact exists, one who acts in justifiable reliance upon it cannot maintain an action of deceit if the maker for any reason changes his mind and fails or refuses to carry his expressed intention into effect. If the recipient wishes to have

> legal assurance that the intention honestly entertained will be carried out, he must see that it is expressed in the form of an enforceable contract, and his action must be on the contract.

Id. at cmt. b. Another comment to this section states:

> Proof of intention not to perform agreement. The intention that is necessary to make the rule stated in this Section applicable is the intention of the promisor when the agreement was entered into. The intention of the promisor not to perform an enforceable or unenforceable agreement cannot be established solely by proof of its nonperformance, nor does his failure to perform the agreement throw upon him the burden of showing that his nonperformance was due to reasons which operated after the agreement was entered into. The intention may be shown by any other evidence that sufficiently indicates its existence, as, for example, the certainty that he would not be in funds to carry out his promise.

Id. at cmt. d. Accordingly, a debtor's promise or statement regarding his *future intention* may constitute a false representation under Section 523(a)(2)(A) if the debtor has no present intention of performing it. *See* Restatement (Second) of Torts § 530(1); *Palmacci v. Umpierrez*, 121 F.3d 781, 786-87 (1st Cir. 1997); *In re Allison*, 960 F.2d 481, 484 (5th Cir. 1992). On the other hand, if a debtor intends to perform at the time he makes a promise, but subsequently changes his mind or fails to perform, then the initial representation will not be actionable for fraud. *See Palmacci*, 121 F.3d at 787; 4 *Collier on Bankruptcy* ¶ 523.08[1][d], at 523-43 (Lawrence P. King ed., 15th ed. 1990).

While it was possible for Daniels to base a Section 523(a)(2) claim on the Debtor's promise of future friendship and support, Daniels was obligated to present sufficient evidence that the Debtor had no present intention of performing that promise, at the time he made his promise to Daniels, in order to oppose the Debtor's motion for summary judgment. Daniels does not, however, offer any evidence of what the Debtor specifically said, when he said it, or in what context the statements were made. Likewise, Daniels has produced no specific evidence regarding the loans that the Debtor's promises allegedly induced, including when Daniels made the loans and how the loans were tied to the Debtor's alleged promises. Daniels makes only unverified statements as to the Debtor's intent in his summary judgment pleadings. In his affidavit,

Bill Blair, a former associate pastor of Parkview, makes a representation as to a statement of intent by the Debtor's father-in-law, Mr. Cowdin, but he makes no statements bearing on the Debtor's intent at the time he received a loan from Daniels. As such, it is irrelevant and cannot save Daniels's claim from summary judgment. *See Anderson*, 477 U.S. at 247-48.

On the basis of this record, a trier of fact could not infer that the Debtor acted with a present fraudulent intent actionable under Section 523(a)(2). Because Daniels does not allege sufficient facts to meet an essential element of his case – the Debtor's fraudulent intent – summary judgment was proper. *Anderson*, 477 U.S. at 249. Accordingly, this Court affirms the Bankruptcy Court's decision to grant summary judgment as to the Section 523(a)(2) claim on alternative grounds supported by the record. *Sampson v. Sampson (In re Sampson)*, 997 F.2d 717, 721 (10th Cir. 1993).

3. Section 523(a)(6)

Section 523(a)(6) excepts from discharge debts resulting from "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). Daniels's contention under this section is that the Debtor willfully and maliciously injured him when he intentionally interfered with Daniels's contract or business relationship with Parkview. According to Daniels, the Debtor improperly interfered when he, along with other members of Parkview's congregation, held an "improper" meeting at which they voted to fire Daniels (the "February 19 meeting"). The Bankruptcy Court rejected Daniels's intentional interference claim because the Debtor was only one of twenty-one church members who voted at the February 19 meeting. As such, the Court concluded that the evidence was insufficient to show that the Debtor (as opposed to the congregation) caused injury to Daniels. On appeal, Daniels argues the Court was in error because he offered proof that the Debtor had "stacked the deck by deliberately withholding notice of the meeting from Daniels and the

church proper, by bringing in 9 of his kin and importing other non-regular parishioners." (Appellant's Opening Br. at 7-8.)

Under Oklahoma law, the tort of intentional interference with contract requires the plaintiff to prove that: (1) the plaintiff had a business or contractual right with which there was interference; (2) the interference was malicious and wrongful, and that such interference was neither justified, privileged nor excusable; and (3) damage was proximately sustained as a result of the complained of interference.[3] *Green Bay Packaging, Inc. v. Preferred Packaging, Inc.*, 932 P.2d 1091, 1096 (Okla. 1996). The record on appeal fails to demonstrate sufficient evidence of either the second or third elements of this claim.

The second element of malicious or wrongful intent can be negated by a showing of "privilege." Oklahoma law allows interference with the employment of another if done "'by fair means, if accompanied by honest intent, and if to better one's own business and not to principally harm another.'" *McNickle v. Phillips Petroleum Co.*, 23 P.3d 949, 950-51 (Okla. Ct. App. 1999) (quoting *Del State Bank v. Salmon*, 548 P.2d 1024, 1027 (Okla. 1976)). This right to lawfully interfere is called a "privilege" and can serve as a basis for summary judgment of a tortious interference claim "where '[d]efendants [have] produced admissible evidence of a proper purpose for their actions [and a plaintiff] provides no admissible evidence of an improper or unjustified act by [defendants].'" *Id.* at 951 (alteration in original) (quoting *Haynes v. South Cmty. Hosp. Mgmt., Inc.*, 793 P.2d 303, 307 (Okla. Ct. App. 1990)). The fact that the defendant's conduct may have been "'strong, aggressive, and intentionally

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[3] The Debtor argues Daniels's intentional interference claim fails because Daniels failed to produce evidence of an contract between himself and Parkview. However, even assuming that no contract existed and that Daniels was an at-will employee, this fact does not preclude Daniels's interference claim under Oklahoma law. As stated by the Oklahoma Court of Appeals: "In the evolution of the tort of interference with the employment contractual relationship in Oklahoma, there is nothing to suggest that the tort would not apply in cases of interference with an at-will contract of employment when the party interfering acts without privilege." *McNickle v. Phillips Petroleum Co.*, 23 P.3d 949, 951 (Okla. Ct. App. 1999).

made'" and "'works to [plaintiff's] detriment'" does not defeat the privilege if defendant's primary objective was proper. *Id.* at 952 (quoting *Del State Bank*, 548 P.2d at 1027).

A review of the record indicates the Debtor has presented evidence of a proper purpose in attending and casting a vote at the February 19 meeting. In his affidavit, the Debtor states that prior to the meeting, he became concerned with allegations of misconduct by Daniels, including financial mismanagement and sexual misconduct. The Debtor was also concerned that Daniels was claiming over $600,000 in past wages, an amount that exceeded the gross cash donations to Parkview from its inception to that time. The Debtor, as a voting member of Parkview's congregation, had an interest in protecting the church's interests and financial position. *See, e.g., Haynes*, 793 P.2d at 307 (concluding defendant hospital employee had privilege to protect patients of employer hospital); *Del State Bank*, 548 P.2d at 1027 (concluding defendant bank had privilege to protect its financial position). The burden then fell on Daniels to produce evidence that the Debtor was motivated by malice or some other improper purpose. *McNickle*, 23 P.3d at 951. The fact that Daniels may believe the Debtor's actions were aggressive, even deplorable, will not defeat the Debtor's privilege so long as the Debtor's actions were done with the intent of protecting the church's interests. *Id.* at 951-52.

In an effort to establish an improper motive, Daniels asserts that the Debtor improperly called the February 19 meeting and procured false accusations of improprieties. Daniels also alleges that the Debtor acted with the goal of taking over Parkview in order to expand his daycare business. However, the only support offered were conclusory allegations of the Debtor's intent. Such bald assertions are insufficient to defeat summary judgment. *See Anderson*, 477 U.S. at 249. The affidavit of former pastor, Bill Blair, also fails to create a material question of fact regarding Debtor's intent. While Mr. Blair's affidavit recounts his memory of the February 19 meeting, its

assertions, like those in Daniels's affidavit, make only summary conclusions regarding the Debtor's intent.[4] Without an evidentiary basis to show the Debtor acted with an improper or unjustified purpose, Daniels's intentional interference claim must fail. *See McNickle*, 23 P.3d at 954.

Moreover, even assuming Daniels's assertion that the intent behind the Debtor's actions was to expand the Debtor's daycare rather than to protect Parkview, the Debtor would still be entitled to claim privilege for his actions. As stated above, Oklahoma law recognizes a privilege to interfere with the contractual relations of another if the primary object of the interference is to better one's own business, rather than to harm another. *Id*. at 950-51. Thus, if the primary motivation behind Debtor's vote at the February 19 meeting was to expand his own business, he was privileged to do so. *Del State Bank*, 548 P.2d at 1027. This is true even if the Debtor's acts were detrimental to Daniels. *Id*.; *McNickle*, 23 P.3d at 951.

Daniels counters that the Debtor's actions were not privileged because the Debtor, along with other members of Parkview's congregation, failed to follow church procedures in calling and conducting the February 19 meeting. However, Daniels failed to designate any evidence for the record from which this Court could determine that the meeting was illegally held. Daniels makes reference to certain "guidelines" of the Union Baptist Association (Complaint ¶ 2.5, *in* App. to Appellant's Opening Br. at 0041) and the "Pastor's Manual" by James Randolph Hobbs (Affidavit of Vernon Daniels ¶¶ 2-3, 13, *in* App. to Appellant's Opening Br. at 0060-61) in his briefs, but he did not submit those documents to the Bankruptcy Court nor designate them for the record on appeal. The burden is on Daniels as Appellant to provide this Court with a suitable record on appeal. *See* Fed. R. App. P. 10(b)(2). Because the evidentiary record is insufficient to

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[4] Daniels cites to Mr. Blair's affidavit for support of his assertion that the Debtor intended to take over Parkview. However, the statement in Mr. Blair's affidavit concerning the "taking over Parkview" relates to the intent of the Debtor's father-in-law, not the Debtor. (Affidavit of Bill Blair ¶ 10, *in* App. to Appellant's Opening Br. at 0068.)

permit assessment of Daniels's claim, this Court must affirm.[5] *Deines v. Vermeer Mfg. Co.*, 969 F.2d 977, 979-80 (10th Cir. 1992).

Finally, Daniels's interference claim fails because he did not present sufficient evidence of damages proximately caused by the alleged interference. Proof of damages is the required third element of an intentional interference claim. *See Green Bay Packaging, Inc.*, 932 P.2d at 1096. In this case, Daniels alleges the Debtor's interference caused him to lose approximately $600,000 in "wage arrearages" accrued as of January 31, 1997. (Appellant's Opening Br. at 2.) As evidence of these damages, Daniels points to an undated letter from the "Parkview Baptist Church and Finance Committee" to Parkview congregational members asking for contributions to help the church pay Daniels his past due salary and retirement benefits. (Plaintiff's Exhibit 'A,' *in* App. to Appellant's Opening Br. at 0087.) The letter explains that Parkview accumulated its debt to Daniels because "there have been months when paying the bills meant neglecting the preacher's salary and retirement benefits." (*Id.*) This evidence, at most, demonstrates that Daniels's wages went unpaid because of Parkview's precarious financial situation. In other words, the evidence in the record on appeal is insufficient to allow a reasonable trier of fact to find that, but for the Debtor's interference, Daniels would have been paid the claimed $600,000. Without evidence of causally-related economic damage, Daniels's claim cannot survive summary judgment. *E.g., Davis v. Board of Regents*, 25 P.3d 308, 311 (Okla. Ct. App. 2001).

CONCLUSION

The order of the United States Bankruptcy Court for the Western District of Oklahoma granting the motion for summary judgment of the Debtor and denying Daniels's motion for summary judgment is therefore AFFIRMED.

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[5] Even if Daniels had designated copies of church rules for the appellate record, Daniels's failure to present the evidence to the Bankruptcy Court would prevent this Court from considering it. *Myers v. Oklahoma County Bd. of County Comm'rs*, 151 F.3d 1313, 1319 (10th Cir. 1998) ("In reviewing a grant of summary judgment, we do not consider materials not before the district court.")